name brand reels and the private brand reels were different articles for the purpose of Section 4216(b)(2), so that, in no event, could the private brand price be used as the base for determining the excise on name brand sales. The court noted, however, that it was doubtful whether the private brand sales to South Bend were comparable to the sales of Shakespeare models, since some of the ordinary costs of manufacture, such as advertising, distributing and selling expenses, includible in the excise tax base, were not included in the private brand sales price (Pet. App. 10a-11a).

Petitioner also raised a procedural due process claim, arising out of the fact that, in determining petitioner's highest wholesale price, the Court of Claims Trial Commissioner had relied in part (Pet. App. 35a) upon evidence that had been excluded at trial. The Court of Claims, however, expressly based its finding of the highest wholesale price on other evidence in the record (Pet. App. 24a, n.1).

ARGUMENT

The decision below is correct. There is no conflict of decisions or other reason for review.

1. The Court of Claims' conclusion that the highest price for which petitioner sold at wholesale was 51 to 55 percent off list is the only conclusion compatible with the facts of this case. While most of petitioner's name brand sales were to retailers, it also regularly made name brand sales to wholesalers at the same price. The court below correctly held (Pet. App. 8a)

that there is nothing in the statute, the legislative history, or the regulations that suggests that wholesale sales are not to be considered as such where retail sales are made at the same price.

There is likewise no basis for petitioner's contention that its wholesale sales at 51 to 55 percent off list are to be disregarded for purposes of Section 4216 (b) (2), because they were made in insufficient volume to establish a wholesale price (Pet. App. 9a-10a). The policy of the statute is clear. It affords relief to manufacturers who sell to retailers and wholesalers by taking the manufacturer's price to wholesalers as the excise tax base. But, as the legislative history shows (Pet. App. 5a-6a), Congress believed it would impose an undue administrative burden upon the Internal Revenue Service (and reviewing courts) to determine a constructive price to wholesalers based on any specific volume of sales to wholesalers, where the manufacturer has himself established his maximum wholesale price by regular sales to even one wholesaler. The instant case illustrates the wisdom of the statutory policy; in view of the marketing practices of the fishing tackle industry, petitioner's position, if sustained, would require a remand of the case for an examination of the businesses of 4,000 customers to determine what proportion of petitioner's dollar sales was made to distributors for resale to independent retailers (cf. Pet. App. 21a).

2. Contrary to petitioner's assertion (Pet. 7), no important question of statutory construction is presented. The problem of the relationship between name brand sales and private brand sales suggested

by *F. W. Fitch Co.* v. *United States*, 323 U.S. 582 (Pet. 8, 14-16), is not involved here, since the decision of the Court of Claims does not rest upon the comparability of the sales to South Bend to the Shakespeare model sales—a question which the court did not finally resolve (Pet. App. 10a-11a)—but on its finding (Pet. App. 24a) that petitioner's sales price to South Bend was not its highest wholesale price.[1] That finding is not to be set aside on petitioner's claim (Pet. 18) that its price of 70 percent off list to South Bend is comparable to the 60-65 percent off list price which its competitors use as their excise tax base. As the court below explained (Pet. App. 10a), the percentage off list prices cannot really be compared, because there is no evidence that petitioner and its competitors set equal list prices on comparable merchandise.

There is no conflict with other circuits as to the excise tax meaning of the terms "wholesaler" and "retailer." The court here, though citing other cases (Pet. App. 8a), applied the very definition of a wholesaler set forth in the cases cited by petitioner—a person who customarily resells to others who, in turn, resell. See *Roland Co.* v. *Walling*, 326 U.S. 657, 674-675. The cases with which petitioner asserts conflict (*Gellman* v. *United States*, 235 F. 2d 87 (C.A. 8); *Torti* v. *United States*, 249 F. 2d 623 (C.A. 7);

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[1] Petitioner's reliance (Pet. 17) on *FTC* v. *Borden Co.*, 383 U.S. 637, is misplaced. That case involved the Robinson-Patman Act (15 U.S.C. 13a), and the distinctions there drawn by the Court between private brand and name brand goods have no bearing here.

United States v. *Redmond*, 328 F. 2d 707 (C.A. 6)) (Pet. 9-10) all are distinguishable in any event. They involve the question whether the retailers excise tax applies to sales in bulk made, for example, to industrial concerns for distribution as awards or prizes to their employees. In each case, it was held that the sellers were not retailers. Retailers were distinguished because they sell in small lots to the ultimate consumer for his personal or family use. The definition of retailers, drawn for purposes of determining the applicability of the retailers excise tax, does not convert a small-scale wholesaler into a retailer for manufacturers excise tax purposes, as petitioner contends (Pet. 9-12).

Nor is there any conflict with *Power Brake Equipment Co.* v. *United States*, 68-2 U.S.T.C., par 15,850 (D. Ore.), affirmed *per curiam*, 70-1 U.S.T.C., par. 15,937 (C.A. 9), upon which petitioner also relies (Pet. 12-14). Petitioner's argument rests on the assumption (Pet. 12) that its excise tax base for name brand sales was computed by the court below by reference to its price to retailers. That is not a correct reading of the decision below. The Court of Claims recognized petitioner's right to use its highest price to wholesalers as the base for its sales to retailers, and determined that price to be 51 to 55 percent off list. In *Power Brake*, on the other hand, as petitioner acknowledges (Pet. 13), the manufacturer's price to wholesale distributors was established, and the question was whether the taxpayer nevertheless had to use the higher actual prices for other sales, some of which were to "dealers" (not identified as wholesal-

ers or retailers) and others to ultimate consumers.[2] As the Court of Claims pointed out (Pet. App. 6a, n.4), *Power Brake* involved taxable periods in 1957 and 1958 and arose under Section 4216(b)(1), which provided relief for sales "at retail" (to the ultimate consumer) and not for sales to retailers. Relief for sales to retailers was provided beginning in 1959 by Section 4216(b)(2), which is the provision here in issue (see Pet. App. 4a-6a). The *Power Brake* decision fixing the excise tax base for the sales to "dealers" at the manufacturer's established wholesale price is therefore not apposite here. Were *Power Brake* to arise under present law, the excise tax base for sales to retailers would be determined under Section 4216(b)(2). There is thus no reason for review by this Court even if *Power Brake* were deemed in conflict with the decision below.

3. Petitioner's due process rights were not violated by the post trial *ex parte* order of the Trial Commissioner (Pet. App. 54a-55a) admitting an exhibit (Jobbers' Register, Deft. Ex. 17, Tr. 874) into evidence after it was initially excluded at trial. The Court of Claims expressly noted (Pet. App. 24a, n.1) that its finding of petitioner's highest wholesale price was not based to any extent on this exhibit. This leaves, at most, only a question as to whether the balance of the record evidence on the point supports the finding—a question not raised by petitioner and not suitable for further review in any event.

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[2] At trial, the government conceded the taxpayer's right to use the established wholesale price on sales to ultimate consumers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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